FILED
MAY 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1730

In The

Supreme Court of the United States

October Term, 1988

ATTORNEYS' TITLE GUARANTY FUND, INC.,

Petitioner,

v.

DAVID K. RICHARDS,

Respondent.

On Petition for Writ of Certiorari To United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DONALD E. PHILLIPSON
(Counsel of Record)
STEVEN J. MERKER
CATHERINE S. MARTINEZ
DAVIS, GRAHAM & STUBBS
Suite 4700
370 Seventeenth Street
P.O. Box 185
Denver, Colorado 80201
Telephone: (303) 892-9400

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is it proper for a federal court considering a case where jurisdiction is based solely on diversity of citizenship to determine an issue of state law which has not yet been directly addressed by the state appellate courts where there is existing state precedent in analogous areas of the law as well as ample authority from other state and federal courts indicating how the state supreme court would likely rule were it faced with similar facts and issues?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

A. The Question Presented Is Not An Appropriate Subject For This Court's Review 6

B. The Tenth Circuit's Determination Is Entitled To The Deference Historically Granted By This Court To The Views Of Circuit Court Judges In Diversity Cases 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Armijo v. Ex Cam, Inc., 843 F.2d 406 (10th Cir. 1988) . . 8, 10

Bishop v. Wood, 426 U.S. 341 (1976) 7

Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960) 10

Cort v. Ash, 422 U.S. 66 (1975) 7

Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569 (10th Cir. 1984) 8

Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988) 11

Dyer v. Johnson, 757 P.2d 178 (Colo. App. 1988) 9

EEOC v. Federal Labor Relations Authority, 476 U.S. 19, 106 S. Ct. 1678 (1986) 10

Erie R.R. v. Tomkins, 304 U.S. 64 (1938) 8

Farmers Alliance Mutual Insurance Co. v. Bakke, 619 F.2d 885 (10th Cir. 1980) 9

Haring v. Prosise, 462 U.S. 306 (1983) 7

Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1322, (10th Cir. 1983), *cert. denied sub nom*, 466 U.S. 958 (1984) 9

Holler v. United States, 724 F.2d 104 (10th Cir. 1983) 10

Lombady v. Stees, 132 Colo. 570, 290 P.2d 1110 (1955) 11

Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959) 10

Novelty Theater Co. v. Whitcomb, 47 Colo. 110, 106 P. 1012 (1909) 11

TABLE OF AUTHORITIES – Continued

Page

Ormsbee Development Co. v. Grace, 668 F.2d 1140 (10th Cir.), *cert. denied*, 459 U.S. 838 (1982) 10

Propper v. Clark, 337 U.S. 472 (1949) 12

United States v. Durham Lumber Co., 363 U.S. 522 (1960) 12

STATUTES AND RULES

28 U.S.C. § 1254(1) 6

Sup. Ct. R. 17 (1980) 7

Sup. Ct. R. 17.1 (1980) 6

OTHER AUTHORITIES

Restatement (Second) of Agency § 261 (1958) 5, 6, 8, 10

No. 88-1730

In The

Supreme Court of the United States

October Term, 1988

ATTORNEYS' TITLE GUARANTY FUND, INC.,

Petitioner,

v.

DAVID K. RICHARDS,

Respondent.

On Petition for Writ of Certiorari To United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The petition presents no legal issue warranting this Court's consideration and accordingly should be denied.

COUNTERSTATEMENT OF THE CASE

1. *Richards' Sale of the 7-Eleven Stores.* Respondent David K. Richards ("Richards") owned thirteen "7-Eleven" store properties located in Colorado and Utah. Richards, an attorney residing in Utah, was a member of Attorneys' Title Guaranty Fund, Inc. ("Attorneys' Title"),

a title insurance company formed by the Colorado Bar Association in 1960. In 1982, Richards was approached by a Denver real estate agent regarding sale of the stores to one of the agent's clients. Negotiations culminated in a contract under which Richards agreed to sell the thirteen stores for $1,050,000, of which $430,000 was to be a down payment. Under the contract Richards agreed to provide title insurance. (App., p. 2.)[1]

2. *The Richards – Attorneys' Title Agreement Regarding Closing.* Richards then contacted the Utah office of Attorneys' Title and requested that they issue title insurance on the properties. Attorneys' Title referred him to its Colorado office to prepare the title insurance on the three Colorado store properties. Richards requested that the Colorado office prepare policies on those properties, handle the closing on the entire transaction, and hold the $430,000 down payment until all Colorado and Utah deeds and related transaction documents had been properly recorded. Attorneys' Title agreed to perform all of these services. (App., pp. 2-3.) Richards then began forwarding all of the documents he was preparing, including deeds, promissory notes, deeds of trust, title reports, and other similar documents, to Attorneys' Title, expecting that Attorneys' Title, as the closing agent, would forward those documents to the buyer for review. (Tr. 25-26.)

3. *The Pre-Existing Relationship Between Attorneys' Title and Centennial.* It is generally the case that title insurance companies such as Attorneys' Title do more than merely issue policies of title insurance. Because the title insurance business is so competitive, title insurance

---

[1] The Tenth Circuit's opinion, submitted as an Appendix to the Petition, is cited herein as "App., p. ___."

companies generally have "closing departments" staffed with employees who provide closing services for their customers. Title insurance companies generally act as escrow agents for closings by holding sales proceeds until deeds and other documents are recorded, and then disbursing those funds to the proper parties. (Tr. 190.)

Attorneys' Title was unique in the competitive title insurance business in Denver – it had no employees of its own who routinely provided closing services. (Tr. 635.) Centennial Escrow Services Inc. ("Centennial"), however, did. Centennial was a company established, among other things, to provide closing services in connection with real estate transactions. (Tr. 547.) Centennial performed those closing services for brokers, attorneys and – significantly – for title insurance companies. (Tr. 547.)

In order to attract business, Attorneys' Title established a relationship with Centennial. Indeed, Attorneys' Title began advertising Centennial to Attorneys' Title members. (Tr. 560-564.) This occurred well before Richards approached Attorneys' Title about handling the closing of the sale of the 7-Eleven properties. (Tr. 673.) By December of 1982, when Richards approached Attorneys' Title, Centennial's closer, Susan Walter, had done a number of closings for Attorneys' Title, at least one of which had involved Centennial's providing escrow services, including the holding of funds pending the happening of certain events. (Tr. 244, 246.) In fact, in December of 1982, Ms. Walters had been with Centennial for almost six months and had not yet done a closing that had not come from Attorneys' Title. (Tr. 246.)

4. *The Attorneys' Title – Centennial Agreement Regarding Closing.* The closing was originally scheduled for

December 10, 1982 but was delayed by agreement between Richards and the buyer until December 30, 1982. Sometime around mid-December, the Attorneys' Title executive in charge of its Denver office contacted Ms. Walter and asked if Centennial could handle a commercial closing for Attorneys' Title. (Tr. 247, 330-31.) Ms. Walter understood the officer from Attorneys' Title to be asking Centennial to do the things usually and customarily associated with a closing, including preparing documents and settlement sheets, attending the closing, making sure that the monies were properly apportioned, disbursing the funds, and recording the documents. (Tr. 331.) Ms. Walter agreed on behalf of Centennial to do the closing for Attorneys' Title. (Tr. 247.)

5. *The Closing*. The closing took place in Denver, Colorado on December 30, 1982. Richards was informed on that day that Ms. Walter of Centennial would perform the closing. (App., p. 10.) At the closing, Ms. Walter refused to release the sales proceeds check to Richards before the transaction documents had been recorded. (App., p. 3.) The buyer and Richards' representative agreed to reissue the sales proceeds check to Centennial to be held in Centennial's escrow account until the transaction documents were recorded. (App., p. 3.) Ms. Walter also signed a document entitled Delivery of Closing Instruments as "Agent for Attorneys' Title." (Tr. 264-65.)

Ms. Walter took the sales proceeds check for $430,000 to Centennial's office and prepared a deposit slip to the escrow account. She then left the check and deposit slip for Duane Marshall ("Marshall"), Centennial's president, to deposit. (App., p. 3.) Marshall deposited the check in Centennial's trust account at Platte Valley Bank on January 3, 1983. *Id*. On January 5, 1983, Marshall asked the

bank to release the $430,000 to him in cash. Not having a sufficient amount of cash on hand, the bank, acting on Marshall's instruction, transferred the money to United Bank of Denver where Marshall received the money in cash and left the state. *Id.*

When all of the transaction documents were recorded, Richards contacted Ms. Walter and requested transfer of the sales proceeds. Ms. Walter then learned Marshall had taken the proceeds and informed Richards. (App., pp. 3-4.)

Richards brought this diversity suit to recover the $430,000 against Attorneys' Title and Platte Valley Bank. Finding against the facts stated by Attorneys' Title in its Statement of the Case, the jury determined that Centennial was Attorneys' Title's agent, that Attorneys' Title had put Centennial in a position that permitted Marshall to commit the theft, and that Centennial was apparently acting within its authority at the time of the theft. *See* App., pp. 4-5.

Attorneys' Title appealed to the United States Court of Appeals for the Tenth Circuit. The issue before the Tenth Circuit was whether, under Colorado law, the district court had properly instructed the jury on Richards' theory of liability. While neither the Colorado Supreme Court nor the Colorado Court of Appeals has considered whether Colorado would adopt *Restatement (Second) of Agency* § 261 (1958) and apply it under circumstances similar to those presented to the district court, the Tenth Circuit analyzed existing state precedent in factually and legally analogous situations and determined that the Colorado Supreme Court would apply § 261 if placed in the position of the district court in this case. (App., pp. 7, 9.)

The court of appeals found further support for its decision to affirm the district court in other Tenth Circuit opinions as well as in a number of decisions emanating from other state and federal courts which had applied § 261 to thefts. (App., pp. 7-8). A Petition for Rehearing, filed with the Tenth Circuit on March 3, 1989, was denied on March 22, 1989.

REASONS FOR DENYING THE WRIT

Despite the fact that the issue before the Tenth Circuit related solely to the interpretation of state law, Attorneys' Title has invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). The grounds advanced in support of granting certiorari are that (i) the Tenth Circuit ruling calls for an exercise of this Court's supervisory powers to ensure that the circuit court of appeals properly applies state law in diversity cases in accordance with doctrines enunciated by this Court, (ii) review of the Circuit Court's opinion would provide the Court with an opportunity to clarify the role of federal courts in applying state law in diversity cases, and (iii) the Tenth Circuit opinion (866 F.2d 1570 (10th Cir. 1989)) is contrary to established Colorado law. (Petition, pp. 8, 15-16.) Because none of these considerations is in fact present in this case, the requested grant of writ of certiorari should be denied.

A. The Question Presented Is Not An Appropriate Subject For This Court's Review.

Review on writ of certiorari is not a matter of right but of judicial discretion and will be granted only when there are special and important reasons therefor. Sup. Ct.

R. 17.1 (1980). Questions of state law are not listed among the considerations governing this Court's review on writs of certiorari. Sup. Ct. R. 17 (1980). While the considerations set forth in Rule 17 are not all inclusive, this Court has historically exercised restraint in granting review where the case or controversy merely implicates questions of state law. *E.g., Haring v. Prosise*, 462 U.S. 306, 314 n. 8 (1983) ("standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review"); *Bishop v. Wood*, 426 U.S. 341, 346 n. 10 (1976) (where district court's interpretation of state statute derived some support from state supreme court decision and was accepted by court of appeals, Court's independent examination of state law issue was foreclosed); *Cort v. Ash*, 422 U.S. 66, 72 n. 6 (1975) (practice of deferring to lower federal courts' determinations of state law questions should generally render review of their decisions unnecessary in this respect).

Although the matter presently before this Court relates solely to the interpretation of state law, Petitioner seeks to avoid this well-established Supreme Court principle of deference by creating a Question Presented which is not consistent with the Tenth Circuit's opinion.

B. The Tenth Circuit's Determination Is Entitled To The Deference Historically Granted By This Court To The Views Of Circuit Court Judges In Diversity Cases.

Petitioner states that the Tenth Circuit ignored long-standing Colorado law and created a totally new substantive theory of liability by fiat without citing any Colorado

law which would indicate that Colorado would extend *Restatement (Second) of Agency* § 261 beyond misrepresentation cases to cases involving other intentional torts. Petitioner additionally asserts that the court of appeals applied a standard of law totally unknown in any other jurisdiction of the United States. (Petition, pp. 8, 12-13, 15.) These arguments mischaracterize the nature of the Tenth Circuit's analysis and also ignore well-established Colorado case law.

In evaluating the correctness of the jury instruction on the liability of Attorneys' Title based upon an extension of § 261 of the *Restatement (Second) of Agency* (App., pp. 4, 7),[2] the Tenth Circuit specifically acknowledged its duty in diversity cases to apply the law of the forum state. (App., p. 4, *citing Erie R.R. v. Tomkins*, 304 U.S. 64 (1938).) Finding no Colorado cases which interpreted § 261, the court of appeals stated that the task before it was to predict whether the Colorado Supreme Court would apply § 261 were it faced with the same facts and issues (App., p. 4). This is an entirely correct statement of the appropriate role of federal courts in the absence of an authoritative pronouncement from a state's appellate courts. *E.g., Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988); *Daitom, Inc. v. Pennwalt Corp.*, 741

---

[2] The jury instruction was based on *Restatement (Second) of Agency* § 261 (1958) which provides as follows:

> A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud.

(App., p. 5.)

F.2d 1569, 1574-75 (10th Cir. 1984); *Herndon v. Seven Bar Flying Service, Inc.*, 716 F.2d 1322, 1332 (10th Cir. 1983), *cert. denied sub nom*, 466 U.S. 958 (1984).

Discharging its task, the court of appeals found that Colorado had recognized a principal's liability for the false representations of its agent, even though made without the principal's knowledge, consent or authority, where the agent has apparent authority to make those representations. (App., p. 6, *citing Dyer v. Johnson*, 757 P.2d 178 (Colo. App. 1988).) Significantly, Petitioner effectively concedes that the court's analysis was correct in this respect. (Petition, p. 11.) The court also found that the jury instruction based on § 261 was consistent with those legal principles adopted by the Colorado Supreme Court allocating risk as between two innocent persons suffering from the acts of a third. (App., p. 7.) The Tenth Circuit further concluded that the Colorado decisions cited by Attorneys' Title as controlling were unpersuasive and clearly distinguishable. (App., pp. 6, 8-9.) Finally, the Tenth Circuit took note of the views of numerous other federal and state courts which had applied § 261 to thefts by an agent, not just misrepresentations. These are all proper resources to consider in deciding an issue that the state courts have not yet addressed. *E.g., Farmers Alliance Mutual Insurance Co. v. Bakke*, 619 F.2d 885, 888 (10th Cir. 1980).[3]

---

[3] Petitioner's arguments concerning abstention and certification to the Colorado Supreme Court are without merit. Although neither party requested certification or expressed objection to the resolution of the issue by the district judge at the trial court level, Attorneys' Title for the first

(Continued on following page)

The carefully reasoned determination by the Tenth Circuit that Colorado would likely adopt § 261 of the *Restatement (Second) of Agency* under similar circumstances is based on existing Colorado case law on analogous points of law and on decisions interpreting § 261 rendered by various state, district and

---

(Continued from previous page)

time asserts that the question whether Colorado would follow § 261 under the circumstances presented to the district court should be certified to the Colorado Supreme Court. This argument is not properly raised and should not be considered by the Court. *See EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 106 S. Ct. 1678 (1986).

Moreover, notwithstanding the absence of a definitive pronouncement from the Colorado state appellate courts, the Tenth Circuit had sufficient resources to guide it in predicting how a state court would rule if presented with similar facts and issues. (App., pp. 6-9.) Certification is discretionary, *e.g.*, *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988); *Holler v. United States*, 724 F.2d 104, 105-06 (10th Cir. 1983), and not to be resorted to mechanically. *See Ormsbee Development Co. v. Grace*, 668 F.2d 1140, 1149 (10th Cir.), *cert. denied*, 459 U.S. 838 (1982). Attorneys' Title has failed to meet its burden to show that the Tenth Circuit abused its discretion by not certifying the issue to the Colorado Supreme Court.

This Court's decisions in *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 212 (1960) and *Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959) (cited by Attorneys' Title at page 9 of its petition) do not support a requirement of certification in this case. Rather, those cases address the appropriateness of seeking certification of unresolved questions of state law where the case or controversy also presents federal constitutional issues which might well be mooted by a state court's determination of an unsettled question of state law. In contrast, the *only* issues implicated in the present controversy are state law questions.

circuit courts. Accordingly, there is no merit whatsoever to Petitioner's assertion that the court of appeals created a new substantive theory of law which the Colorado Supreme Court has expressly rejected and which has not been adopted in any other jurisdiction of the United States.

The Colorado cases cited by Attorneys' Title in its petition are no more persuasive than those raised by Attorneys' Title in connection with its appeal to the Tenth Circuit. The decisions in both *Lombady v. Stees*, 132 Colo. 570, 290 P.2d 1110 (1955) and *Novelty Theater Co. v. Whitcomb*, 47 Colo. 110, 106 P. 1012 (1909), in which the Colorado Supreme Court refused to impute liability because the torts committed by the servant did not arise out of the scope of employment and were not expressly or impliedly authorized by the master, only address a master's liability for the acts of its servants under the doctrine of respondeat superior. *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988), the linchpin for Petitioner's argument that the Tenth Circuit incorrectly predicated how Colorado state courts would rule if confronted with this issue, also focuses on the master-servant relationship. The issue before the Colorado Supreme Court in *Destefano* was whether the diocese was vicariously liable for the tortious conduct of its parish priest. *Destefano*, 763 P.2d at 287. The state supreme court refused to impute vicarious liability to the diocese for the conduct of a parish priest where the priest was clearly acting outside the scope of his employment. In short, vicarious liability under the doctrine of respondeat superior is a legal concept distinct from liability imposed on a principal by virtue of the tortious conduct of its agent, and Petitioner concedes this is the case. (Petition, pp. 11-12.)

The jury determined that Centennial was acting as Attorneys' Title's agent in performing the closing services in the Richards transaction and, further, that Centennial was acting within its apparent authority and in the place of Attorneys' Title at the time of the theft. (App., pp. 9-11.) The opinion of the court of appeals evinces a carefully reasoned and thoughtful prediction of how a Colorado appellate court would likely rule if presented with the controversy at hand regarding principal and agency issues.

Since the Tenth Circuit did not create a new substantive theory of law which the Colorado Supreme Court has expressly rejected, the Question Presented by Attorneys' Title fails to present an appropriate subject for this Court's review. *See e.g., United States v. Durham Lumber Co.*, 363 U.S. 522, 526-27 (1960); *Propper v. Clark*, 337 U.S. 472, 486-87 (1949).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD E. PHILLIPSON
(Counsel of Record)
STEVEN J. MERKER
CATHERINE S. MARTINEZ
DAVIS, GRAHAM & STUBBS
Suite 4700
370 Seventeenth Street
P.O. Box 185
Denver, Colorado 80201
Telephone: (303) 892-9400